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Advanced Telephonics, Inc. and Communications Workers of America, Local 1109, AFL-CIO.
Case 2-CA-35699

February 27, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

The General Counsel seeks a default judgment¹ in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by the Union on August 8, 2003, the General Counsel issued the complaint on October 31, 2003, against Advanced Telephonics, Inc., the Respondent, alleging that it has refused to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act by failing to make contributions to union benefit funds and to remit deducted dues to the Union. The Respondent failed to file an answer.

On January 2, 2004, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support with the Board. On January 6, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was filed by November 14, 2003, all the allegations in the complaint would be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated December 1, 2003, notified the Respondent that unless an answer was received by December 15, 2003, a motion for default judgment would be filed.

¹ The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer to the complaint. Accordingly, we construe the General Counsel's motion as a motion for default judgment.

In the absence of good cause being shown for the failure to file a timely answer,² we grant the General Counsel's motion for default judgment with respect to the Respondent's alleged failure to make benefit fund contributions. However, as fully discussed below, we deny the motion for default judgment with respect to the Respondent's alleged failure to remit deducted dues, since the allegations are ambiguous or inconsistent, thereby making it impossible to determine whether the conduct violated Section 8(a)(5) as alleged and what the appropriate remedy should be.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, with offices at 250 West 49th Street, New York, New York, has been engaged in the sale and service of telecommunications equipment.

Annually, the Respondent, in conducting its business operations described above, has sold goods and services valued in excess of \$50,000 directly to enterprises located outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Communications Workers of America, Local 1109, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees (employed in the States of New York, New Jersey, and Connecticut) excluding clerical employees and supervisors as defined by the Labor-Management Relations Act of 1947, as amended.

At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and the Union has been recognized as the exclusive representative by the Respondent. This recognition

² Both the complaint and the December 1 letter were served on the Respondent by certified mail, return receipt requested, but no return receipt was received. It is well settled that a respondent's failure or refusal to claim certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See *ICE Electric, Inc.*, 339 NLRB No. 36, slip op. at 1, fn. 2 (2003), and cases cited there. Further, the December 1 letter was also served by regular mail, and the letter was not returned. The failure of the Postal Service to return documents served by regular mail indicates actual receipt. *Id.*

has been embodied in successive collective-bargaining agreements, the most recent of which was effective from February 13, 2000, through February 12, 2003.

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

A. Failure to Make Benefit Fund Contributions

The complaint alleges, and in the absence of an answer we find, that since about May 20, 2003, the Respondent has ceased making contributions to the Communications Workers Local 1109 Pension Fund and the Communications Workers Local 1109 Welfare Fund as required under the terms of the most recent collective-bargaining agreement between the Union and the Respondent. This subject relates to wages, hours, and other terms and conditions of employment of the unit and is a mandatory subject for the purposes of collective bargaining. Further, the Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct. Accordingly, the Respondent thereby refused to bargain in violation of Section 8(a)(5) and (1) of the Act.

B. Failure to Remit Dues Deducted From Employee Paychecks

The complaint further alleges that, since in or around April 2003, the Respondent has ceased remitting to the Union dues payments deducted from employee paychecks. The complaint alleges that this is a mandatory subject for the purposes of collective bargaining, that the Respondent engaged in this conduct without prior notice to the Union and without affording the Union an opportunity to bargain, and that the Respondent thereby refused to bargain with the Union in violation of Section 8(a)(5) of the Act.³ The General Counsel's brief in support of the motion for default judgment likewise urges us to find that the Respondent's alleged failure to continue remitting deducted dues without the Union's consent violated Section 8(a)(5), citing *Talaco Communications, Inc.*, 321 NLRB 762 (1996). For the reasons set forth below, however, we decline to grant default judgment with respect to this allegation and shall remand it for further appropriate action.

³ The complaint actually alleges that the Respondent's refusal to bargain violated "Section 8(a)(1) and (5) of the Act." However, the 8(a)(1) allegation appears to be a derivative of the 8(a)(5) allegation rather than an independent 8(a)(1) allegation. See, e.g., *ABF Freight System, Inc.*, 325 NLRB 546 fn. 3 (1998); *T.L.C. St. Petersburg, Inc.*, 307 NLRB 605, 607 fn. 1 (1992), enfd. mem. 985 F.2d 579 (11th Cir. 1993).

Talaco Communications, supra, was a default-judgment proceeding in which the complaint alleged that the respondent employer had failed to remit dues to the union that were deducted both during and after the term of the parties' collective-bargaining agreement. With respect to dues deducted from employee paychecks during the term of the agreement, the Board held, in accordance with longstanding precedent, that the employer's failure to remit the deducted dues to the union constituted an unlawful refusal to bargain in violation of Section 8(a)(5) of the Act. The Board therefore ordered the employer to remit the withheld dues to the union as required by the agreement.

In contrast, with respect to dues deducted from employee paychecks after the parties' contract expired, the Board held that the employer's retention of the deducted dues violated Section 8(a)(1), rather than Section 8(a)(5) of the Act. The Board cited well-established precedent holding that an employer's obligation to abide by the terms of a dues-checkoff provision ceases with the expiration of the contract. The Board found that once an employer deducts dues from employees' paychecks, however, it is not entitled to keep the money for itself. If the dues were deducted pursuant to valid checkoff authorizations that have not expired or been revoked, the union is entitled to the money. If, on the other hand, the employees' checkoff authorizations expired or were revoked after contract expiration, then the employees are entitled to the money. The Board found that, in either event, the employer's retention of the checked-off dues interferes with, restrains, or coerces employees in the exercise of their Section 7 rights to join and assist a labor organization in violation of Section 8(a)(1) of the Act. The Board therefore ordered the respondent employer to remit the deducted dues to the union, or to the employees, depending on whether the employees' checkoff authorizations had expired or were revoked after contract expiration, an issue which the Board left to be determined in the compliance proceeding. See 321 NLRB at 763-764. Accord: *Able Aluminum Co.*, 321 NLRB 1071 (1996), and *Valley Stream Aluminum, Inc.*, 321 NLRB 1076 (1996).

As indicated above, here the complaint alleges that the parties' contract expired on February 12, 2003, and that, since around April 2003 (i.e., beginning over a month later), the Respondent ceased remitting to the Union dues payments deducted from employee paychecks. On its face, this allegation indicates that the Respondent both deducted the dues and failed to remit them after the contract expired in February 2003. And, as discussed above, *Talaco Communications* holds that such conduct violates Section 8(a)(1) rather than Section 8(a)(5), and that the appropriate remedy is to require the deducted dues to be

remitted to the Union or to the employees, depending on whether the employees' checkoff authorizations had expired or been revoked.

Since the complaint alleges that this conduct constituted a refusal to bargain in violation of Section 8(a)(5) and the General Counsel's motion for default judgment makes the same assertion, citing *Talaco Communications*, it appears that either: (1) the General Counsel actually intended to allege that the Respondent failed to remit dues that were deducted before, rather than after, contract expiration; or (2) the General Counsel has incorrectly pleaded the allegation as an 8(a)(5) violation rather than an 8(a)(1) violation. As we are unable to determine which of these alternatives is correct, and, therefore, what the appropriate violation and remedy should be, we deny the General Counsel's motion for default judgment with respect to this allegation and remand it for further appropriate action.⁴ Nothing herein will require a hearing on remand if, in the event of an amendment to the complaint, the Respondent again fails to answer, thereby admitting evidence that would permit the Board to find the violations alleged and order an appropriate remedy. In such circumstances, the General Counsel may file a new motion for default judgment with respect to the amended complaint allegations.

CONCLUSION OF LAW

By failing, since May 20, 2003, to make contributions to the Union Pension and Welfare Funds as required under the terms of the parties' most recent collective-bargaining agreement, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to make required contributions to the Union Pension and Welfare Funds since about May 20, 2003, we shall order the Respondent to make whole its unit employees by making all required contributions to those funds that have not been made since that date, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB

1213, 1216 fn. 6 (1979). The Respondent shall also reimburse unit employees for any expenses ensuing from its failure to make the required benefit fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf'd. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁵

ORDER

The National Labor Relations Board orders that the Respondent, Advanced Telephonics, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to make required contributions to the Communications Workers Local 1109 Pension and Welfare Funds on behalf of employees in the following appropriate unit:

All full-time and regular part-time employees (employed in the States of New York, New Jersey, and Connecticut) excluding clerical employees and supervisors as defined by the Labor-Management Relations Act of 1947, as amended.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all required contributions to the Union Pension and Welfare Funds that have not been made on behalf of unit employees since May 20, 2003, and reimburse the unit employees for any expenses resulting from its failure to make the required contributions, with interest, in the manner set forth in the remedy section of this Decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

⁴ See generally *Michigan, Inn*, 340 NLRB No. 115 (2003), and cases cited therein.

⁵ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

(c) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2003.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 27, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

I would grant default judgment in favor of the General Counsel without the need for a remand on the dues allegation of the complaint. In my view, the complaint clearly alleges that since April 2003 (postcontract expiration), the Respondent ceased remitting to the Union dues payments deducted from employee paychecks. Although the complaint alleges that this conduct violated Section 8(a)(1) and (5) under a refusal to bargain theory, the Board can find and remedy an independent violation of Section 8(a)(1) under a more limited theory of violation that is encompassed within the complaint's broader theory.

It is true that the General Counsel's memorandum in support of its Motion for Summary Judgment cites *Ta-*

laco Communications, Inc., 321 NLRB 762 (1996), where the Board held that the respondent's postcontract failure to remit dues violated not Section 8(a)(5), but rather Section 8(a)(1), on the theory that it interfered with, restrained, or coerced employees in the exercise of their Section 7 rights.¹ There is therefore, as the majority describes, some ambiguity in the complaint. Nonetheless, the complaint seems clearly to involve a postcontract expiration withholding of dues. And the appropriate 8(a)(1) violation is expressly encompassed within the broader refusal to bargain theory alleged. Thus, *Talaco* states that by failing to remit dues withheld *during the contract term* the respondent has refused to bargain collectively and "has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights." Id. at 763. I would therefore not find that the General Counsel's failure to independently allege the 8(a)(1) violation compels a remand.

The only real issue of substance before us is whether the dues were deducted pursuant to valid, unexpired, and unrevoked employee checkoff authorizations, and, thus, whether the dues money is properly payable to the Union or the employees. As in *Talaco* itself, this determination may be made at the compliance stage.

Dated, Washington, D.C. February 27, 2004

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ The decision in *Talaco*, is seemingly inconsistent with other precedent, which *Talaco* neither discusses nor even cites. See, e.g., *Manumont Corp.*, 317 NLRB 1035 (1995), finding that failure to remit withheld dues to the union either during contract term or postcontract termination violates Sec. 8(a)(5) and (1).

Choose not to engage in any of these protected activities.

WE WILL NOT fail to make required contributions to the Communications Workers Local 1109 Pension and Welfare Funds on behalf of employees in the following appropriate unit:

All full-time and regular part-time employees (employed in the States of New York, New Jersey, and Connecticut) excluding clerical employees and supervisors as defined by the Labor-Management Relations Act of 1947, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make all required contributions to the Union Pension and Welfare Funds that have not been made on behalf of unit employees since May 20, 2003, and WE WILL reimburse the unit employees for any expenses resulting from our failure to make the required contributions, with interest.

ADVANCED TELEPHONICS, INC.